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NO. 80-1476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TANKLINING CORPORATION,
Petitioner,

v.

GALVESTON SHIPBUILDING CO.,
BREWER KMI, INC., AND
C. BREWER & CO., LTD.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

Counsel of Record:

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LIST OF PARTIES

As per U.S. SUP. CT. R. 22.1, 28.1, and 34.1(b), the following is a list of parties and related companies:

Tanklining Corporation
Tanklining of Texas, Inc.
Interstate Railcar Services, Inc.
(Tanklining Corporation owns majority of voting shares)

Brewer KMI, Inc.
Galveston Shipbuilding Company

C. Brewer & Co., Ltd. (Wholly owned by I.U. International Corporation)
(Parent corporation of Brewer KMI, Inc.)

Subsidiaries:

Brewer Chemical Corporation
Hilo Transportation & Terminal Co., Inc.
National Molasses Company
Hawaiian Agronomics International, S.A.
Kilauea Agronomics, Inc.
Mauna Loa Macadamia Nut Corporation
Empresa Agricola El Pacayal, S.A.
Brewer Solomons Associates
Ka'u Sugar Co., Inc.
Mauna Kea Sugar Co., Inc.
Olokele Sugar, Ltd.
Wailuku Sugar Company
Hawaiian Agronomics Company
Hawaiian Investment Co., Inc.
Hawaiian Insurance Companies

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

The Respondents, Galveston Shipbuilding Co., Brewer KMI, Inc., and C. Brewer & Co., Ltd., respectfully pray that Petitioner's Petition for a Writ of Certiorari be denied. As per U.S. SUP. CT. R. 22.1 and 34.2, Respondents state their satisfaction with Petitioner's Questions Presented, Opinion Below, and Jurisdiction, but Respondent would like to correct some inaccuracies and omissions in the Petitioner's statement of the case.

STATEMENT OF THE CASE

Respondents disagree with Petitioner's Statement of Facts especially as it relates to those events that took place on and after September 9, 1976. Some of the facts recited do not take into account the District Court's findings and the many conflicts in testimony. Without referring to the undisputed facts or inconsequential inaccuracies, Respondents will make their Statement of the Case. References will read as to Petitioner's Appendix "P.A.-#," and as to Respondents' Appendix "R.A.-#."

The Purchase Order dated August 11, 1976, between Petitioner and Respondent's agent, Galveston Shipbuilding Co., hereinafter Galveston Shipbuilding, provided for a price of $333,110.00. This price included $41,555.00 for coatings, of which only $15,338.40 was actually purchased by Petitioner. (R.A.-4) There was conflict in the testimony as to whether, under the Purchase Order, blasting was to begin on August 30th (as Petitioner claims) or in the middle of August, with coating to begin on August 16th (as Galveston Shipbuilding alleged). The District Court favored the latter. (P.A.-9) Both the barge and the shipyard were available to receive men and equipment in preparation for blasting and coating as early as August 5, 1976.

From almost the very beginning of the job, Galveston Shipbuilding was concerned about Petitioner's ability to complete the job, but Petitioner contended this concern was sudden as of September 9, 1976. The District Court stated that the concern was evident at least by the week of August 30, 1976. (P.A.-11, 19) Time was not only of the essence in the Purchase Order, but also critical. (P.A.-6, 21) Due to Petitioner's substantial breach of its con-

tractual obligations, Galveston Shipbuilding justifiably, the District Court found, terminated the Purchase Order on September 9, 1976. (P.A.-20) It is undisputed that not one square foot of one tank was blasted satisfactorily. (P.A.-12) No attempt to coat took place. Petitioner has always contended that Galveston Shipbuilding promised to make Petitioner whole by paying all of its costs on the job, but Galveston Shipbuilding has always denied this and the District Court's finding supported Galveston Shipbuilding. (P.A.-14)

Maritime Coatings, Inc.'s purchase order stated that it was to be paid $319,000.00 if the job was completed within the four-week period ending October 8, 1976, and was to be paid $275,000.00 if the job required six weeks to October 22nd. Neither price included coatings. Maritime Coatings completed all operations by October 17th and was paid $319,000.00 (R.A.-5) Petitioner argued this payment was wrong, but Galveston Shipbuilding stated that the payment was proper since for all practical purposes the work was completed within four weeks; the District Court agreed with Galveston Shipbuilding. (P.A.-17)

The District Court in his Findings of Fact and Conclusions of Law Relating to Damages found the measure of Galveston Shipbuilding's damages to be its cost of completion less the balance owed to Petitioner. (R.A.-6) Cost of completion was $319,000.00 (monies paid to Maritime Coatings). The balance due Petitioner was $273,943.40 determined as follows: $333,110.00 (Purchase Order price) minus $41,555.00 (value of coatings included but not purchased) minus $32,950.00 (down-payment paid by Galveston Shipbuilding) plus $15,-338.40 (value of coatings actually purchased by Peti-

tioner). Galveston Shipbuilding's judgment was $319,-000.00 minus $273,943.40, which equals $45,056.60, plus costs and interest. (P.A.-2) The Court of Appeals affirmed both the District Court's Findings of Fact, Conclusions of Law and Memorandum Opinion and its Findings of Fact and Conclusions of Law Relating to Damages. (P.A.-1)

ARGUMENT

This Court should deny Petitioner's Petition for Writ of Certiorari. The decisions below turned on the unique facts of this narrow business construction case, and will not affect anyone other than the litigants themselves. The case will not serve as precedent in any court since neither the District Court's nor the Fifth Circuit's opinion was published. Even if the questions were important, the courts below responded to them properly such that no question was decided in a way conflicting with the state courts. U.S. SUP. CT. R. 17.1(a).

First, where the contractor (Petitioner) has partly performed and then defaulted, and the defects and omissions may be remedied without economic waste, the measure of the owner's (Galveston Shipbuilding) recovery is its cost of completion, whether or not contractor's performance is substantial, credited against the balance owed to the contractor. *McKnight v. Renfro,* 371 S.W.2d 740, 745 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.); *Loggins v. Gates,* 301 S.W.2d 525, 527 (Tex. Civ. App. —Waco 1957, writ dism'd); 5 CORBIN ON CONTRACTS § 1089 at 491; RESTATEMENT OF CONTRACTS § 346 (1933). The Petitioner misconstrues the difference in the stated contract prices of Maritime Coatings' purchase

order as a "bonus" and "special damage." Certainly, it was in the contemplation of the parties that if Petitioner did not complete one single task that was of some benefit to Galveston Shipbuilding, someone else would have to be hired to do the job at, more than likely, Petitioner's contract price or higher. *Humble Oil & Refining Co. v. Wood,* 292 S.W. 200 (Tex. Comm'n App. 1927, jdgmt adopted).

The District Court found that Petitioner was given at least ten weeks, from July 30, 1976 to October 9, 1976, to perform its contract with Galveston Shipbuilding. (P.A.-9) The performance essentially included setting up equipment, blasting, priming, coating, and then taking the equipment down. After six weeks had passed, not one square foot of one of the five tanks on the barge was prepared for coating. (P.A.-10) Petitioner was not able, willing, or prepared to finish the job within the four weeks that remained on the contract. (P.A.-17) After the termination of Petitioner's contract on September 9, 1976, Galveston Shipbuilding contracted with Maritime Coatings to perform the same task.

Maritime Coatings' purchase order dated September 10, 1976 refers to the schedule for job performance as follows:

> As time is of the essence; work is to begin Friday, September 10, (with beginning of shipping equipment to Galveston) and all work is to be performed within the twenty-nine (29) days, approximately four (4) weeks ending on October 8, 1976, as quoted by your Mr. Dick Trum. October 9th is the scheduled date for removing coating equipment from the vessel in preparation for launching on October 10th.

Maritime Coatings' contract gave it from September 10th through October 8th, 1976, to ship equipment and manpower to Galveston and finish the job. October 9th was to be used to remove the equipment from the barge. Maritime Coatings finished the job by October 17, 1976. The District Court found that for all practical purposes, Maritime Coatings completed the work within four weeks. (P.A.-17) In approximately four weeks, Maritime Coatings performed the task which Petitioner could not even begin to make progress on in six weeks. The total amount paid to Maritime Coatings of $319,000.00 was the cost of the performance of the job. This payment made under Maritime Coatings' contract was in mitigation of damages since it saved Galveston Shipbuilding, and therefore Petitioner, from a claim by the owners for liquidated damages, or worse, cancellation of the contract. (P.A.-6) Petitioner knew severe consequences could result if the job was not completed on time. (P.A.-9)

The Maritime Coatings' price provision in its contract reads as follows:

> Three Hundred Nineteen Thousand Dollars ($319,-000.00) if job is completed within the specified four (4) week period ending October 8, 1976.
>
> Two Hundred Seventy-Five Thousand Dollars ($275,000.00) if job requires six (6) weeks (to October 22nd).

The job did *not* require until October 22nd to finish. The parties by their conduct resolved the ambiguity of what price was to be paid if the job required a little over four weeks to finish.

Petitioner talks about the "duty" of Galveston Shipbuilding to mitigate damages. While the injured party

should make a reasonable effort to avoid consequences of a breach, he is not required to imperil his cause of action or sacrifice a substantial right, or incur undue risk, expense or humiliation. 11 WIILLISTON, TREATISE ON THE LAW OF CONTRACTS § 1353 at 274 (Jaeger ed. 1961). Galveston Shipbuilding did make a reasonable effort, as previously shown. What is a reasonable effort is a question of fact for the trial court, without jury, to decide. *Id.* at 277.

Petitioner should not be allowed to gain by its own breach. However, that is exactly what it will do if it is allowed to ignore the District Court's finding as to cost of completion.

Secondly, Petitioner left on the job site coatings valued at $15,338.40 which were used by Galveston Shipbuilding. Petitioner's contract price included coating material with a value of $41,555.00. Maritime Coatings' contract price was $319,000.00, which did *not* include the price of coatings since Galveston Shipbuilding was to provide this. It is undisputed that not one ounce of coating was used, but that only primer was used. Only $15,338.40 out of $41,555.00 worth of coatings for the job was even purchased. A logical inference is that Galveston Shipbuilding would have had to purchase at least the same amount of coatings for Maritime Coatings to do the job, as was contemplated by Petitioner originally. To make a fair comparison between contracts at trial, the value of coatings to be purchased was subtracted out of Petitioner's contract so that the true and comparable contract price of $291,555.00 was established.

It is fundamental that in order to complain about a ruling by the District Court, the complaining party must

"make known to the Court the action that he desires the Court to take or his objection to the action of the Court and his grounds therefor." 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2472 at 454 (1971). The objection must state the specific grounds therefor or it is insufficient. *Id.* § 2473 at 462. Also, the complaining party will not be allowed to rely on appeal on grounds other than those stated in the objection. *Id.* § 2473 at 464. In this case, Petitioner did not object to the use by Galveston Shipbuilding of evidence, exhibits, and Petitioner's witnesses' testimony as to the value of coatings or its use in the measure of Galveston Shipbuilding's damages. The issue was not raised in the District Court below. Further, this issue was an implied fact finding by the District Court when it found the balance due Tanklining to be $273,943.40. *Boley v. Griswold,* 87 U.S. 486, 487, 20 Wall. 486, 22 L.Ed. 375 (1874); *Aetna Ins. Co. v. Rhodes,* 170 F.2d 111, 115 (10th Cir. 1948).

CONCLUSION

The Findings of Fact and Conclusions of Law of the District Court, as affirmed by the Court of Appeals, were correct. The determinations of the cost of completion of a job not done and the balance due to Petitioner on an uncompleted contract were correct, logical, and legal. To do otherwise would be to reward Petitioner for its breach of contract. The questions raised are narrow and the answers are never likely to be precedent.

For these reasons, a Writ of Certiorari should *not* be issued to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

Of Counsel:

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Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari have been mailed by certified mail, return receipt requested, to all counsel of record on this _____ day of March, 1981.

_____

CHARLES M. JORDAN

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION No. G-77-164

TANK LINING CORPORATION
Plaintiff

v.

GALVESTON SHIPBUILDING CO.,
BREWER KMI, INC., and
C. BREWER & CO., LTD.
Defendants

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO DAMAGES

On the 1st day of May, 1979, the parties, through counsel, appeared in chambers, and counsel for both parties presented to the court their proposed findings of fact and conclusions of law relating to damages and submitted oral arguments in support of their proposed findings. The court, having duly considered the evidence, the arguments of counsel, and the proposed findings of fact and conclusions of law relating to damages submitted by both parties, finds that the FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO DAMAGES submitted by the plaintiff are substantially correct, except as noted below, and said plaintiff's FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO DAMAGES are adopted as the Court's findings of fact and

conclusions of law relating to damages, with the following exceptions:

1. The court does not and cannot accept the proposition that the plaintiff is entitled to recover the sum of $32,688.28 for shipyard services over and above the contract. The court's reasons for this conclusion are: The measure of damages for breach of contract for failure to complete the work in a timely manner is set forth in the purchase order. No provision is made in the contract for shipyard services over and above the contract. There is considerable dispute between the parties as to whether or not the so-called "shipyard services" were actually called for by the contract, and the court is not persuaded by a preponderance of the evidence that said shipyard services were not provided for by the contract. In the event Tank Lining Corporation had completed the work, it is the court's belief that this claim for shipyard services over and above the contract would have been negotiated, and it is highly unlikely that Galveston Shipbuilding would have been paid for all of said services. In short, the court is not persuaded that the plaintiff has borne its burden of proof with reference to the $32,688.28 in shipyard services over and above the contract, and this element of damage is DENIED.

2. The court cannot accept the proposition that attorneys fees are proper in this matter. The gist of the plaintiff's case is a claim for breach of contract. Under the traditional view of the Texas Attorneys Fees statutes, before its amendment subsequent to

the accrual of this cause of action, the basic rule was that a party suing for breach of contract is not entitled to attorneys fees.

With the exceptions noted, the plaintiffs' FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO DAMAGES are incorporated by reference and adopted as the COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO DAMAGES, and judgment will be entered accordingly.

ENTERED and EXECUTED at Galveston, Texas, this the 2nd day of May, 1979.

/s/ Finis E. Cowan
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION NO. G-77-164

TANK LINING CORPORATION
Plaintiff

v.

GALVESTON SHIPBUILDING CO.,
BREWER KMI, INC., and
C. BREWER & CO., LTD.
Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO DAMAGES

The Court adopts, re-affirms, and makes a part of these Findings of Fact and Conclusions of Law its Findings of Fact and Conclusions of Law found, concluded, and adjudged in and by its Memorandum Opinion and Order given and filed herein on April 19, 1979, on the separate issue of breach of contract. The Court, makes the following Findings of Fact, and therefrom, the following Conclusions of Law herein on the issue of damages:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The following facts were stipulated or undisputed in the evidence:

a) The GALVESTON SHIPBUILDING-TANK LINING contract price was $333,110.00;

b) The contract price included TANK LINING furnishing the coating materials with value of $41,-555.00;

c) TANK LINING was paid $32,950.00 by GALVESTON SHIPBUILDING as a down payment;

d) GALVESTON SHIPBUILDING used $15,-338.40 worth of coatings left on the job site by TANK LINING to complete the job;

e) The contract price paid to MARITIME COATINGS, INC., to complete the work was $319,000.00, not including any coating materials;

f) The predicate to the introduction of attorney's fees under Article 2226 of the Texas Revised Civil Statutes Annotated was made;

g) The amounts of reasonable attorney's fees submitted into evidence by the attorney for GALVESTON SHIPBUILDING, and to be awarded to GALVESTON SHIPBUILDING, in addition to all other recoveries are as follows:

1) $15,000.00 for preparation and trial of this cause;

2) $10,000.00 for an appeal to the United States Court of Appeals for the Fifth Circuit;

3) $7,500.00 for responding to an Application for Writ of Certiorari to the Supreme Court of the United States; and,

4) $7,500.00 for an appeal to the Supreme Court of the United States, in the event the Application for Writ of Certiorari is granted.

h) The balance due to TANK LINING on the contract is $258,605.00. This sum is the contract price, $333,110.00, minus the down payment, $32,950.00 minus the coatings not used, $41,555.00.

2. By a preponderance of the credible evidence, it was shown that the shipyard services outlined in GALVESTON SHIPBUILDING's invoice dated August 11, 1976 sent to TANK LINING, were over and above the contract services that were to be provided by GALVESTON SHIPBUILDING and paid for by TANK LINING regardless of whether or not the contract was completed. Therefore, TANK LINING owes to GALVESTON SHIPBUILDING, the amount of the invoice, $32,688.28, which charges were reasonable and customary.

3. The basic premise for recovery by GALVESTON SHIPBUILDING is that TANK LINING's default, the measure of GALVESTON SHIPBUILDING is recovery of its cost of completion less the balance owed to TANK LINING.

4. Under Tex. Rev. Civ. Stat. Ann. art. 5069-1.03 (1971), pre-judgment interest at 6% per annum shall run from January 1, 1977 through the date of judgment.

5. The below mathematical calculations show the damages which GALVESTON SHIPBUILDING suffered as a direct and proximate result of TANK LINING's breach of contract and which shall be awarded:

Galveston Shipbuilding's cost of completion		$ 319,000.00
Plus: Galveston Shipbuilding's Shipyard services over and above contract		$ 32,688.28
Less: Balance owed on contract to Tank Lining		$(258,605.00)
: Coatings left on job site by Tank Lining		$(15,338.40)
		$ 77,744.88
Plus: Galveston Shipbuilding's attorney's fees for trial and appeal		$ 40,000.00
		$ 117,744.88

Plus: Pre-judgment interest at 6% through date of Judgment

: Post-judgment interest at 9% from date of Judgment until paid

6. Alternatively, GALVESTON SHIPBUILDING is entitled to the sum of money paid to MARITIME COATINGS over and above the price it was to pay to TANK LINING for the same job. Further, the downpayment paid by GALVESTON SHIPBUILDING shall be returned to it. In addition, TANK LINING shall pay for the shipyard services rendered over and above the original contract.

7. The alternative and additional theory to support GALVESTON SHIPBUILDING's recovery from TANK LINING is mathematically shown as follows:

Maritime Coatings' Contract Price		$ 319,000.00
Less: Tank Lining's Contract Price (333,110.00 - 41,555.00)		(291,555.00)
: Coatings left on job site		(15,338.40)
Plus: Downpayment		32,950.00
: Shipyard services over and above contract		32,688.28
		$ 77,744.88
Plus: Attorney's fees		40,000.00
		$ 117,744.88

Plus: Prejudgment interest at 6%
Post-judgment interest at 9%

8. That the law herein is with the GALVESTON SHIPBUILDING and against TANK LINING; and that GALVESTON SHIPBUILDING is entitled to have and recover herein, of and from TANK LINING, and judgment ought to be given and entered herein for GALVESTON SHIPBUILDING and against TANK LINING for damages in the sum of $117,744.88, with remititure on attorney's fees for appellate steps not taken, and interest as allowed by law, and GALVESTON SHIPBUILDING's costs herein to the extent permitted by law.

ENTERED and EXECUTED this the_____ day of _____, 1979.

FINIS E. COWAN
United States District Judge